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80-1757
No.

In the Supreme Court of the United States

OCTOBER TERM, 1980

W. JASON MITAN,

Petitioner,

vs.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION [OF ILLINOIS], et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JULIUS LUCIUS ECHELES
CAROLINE JAFFE
35 East Wacker Drive
Chicago, IL 60601
Attorneys for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

QUESTIONS PRESENTED FOR REVIEW

1. Does the Seventh Circuit's interpretation of the Civil Rights Act [42 U.S.C. 1983 et seq.]— barring attorneys from federal perusal of their claims of violation of due process in the procurement of a State disbarment order via the Act and limiting the possibility of federal review to the opportunity to petition for certiorari to the Supreme Court from the highest State court's order respecting the disbarment—deny equal protection of the laws to attorneys as opposed to members of other respected and regulated profession?

(A) Does the Seventh Circuit's application of *Grossgold* v. *Supreme Court of Illinois,* 557 F.2d 122 (7 Cir. 1977), to preclude Federal Civil Rights Act jurisdiction over petitioner's claim, although he alleged violations of his due process and other constitutional rights in the procurement of the State disbarment order [for alleged misstatements in his application for admission to the Bar, not for any supposed wrongdoing after his admission], improperly limit the scope of the Civil Rights Act in a manner contrary to the obvious intent of the legislature and in violation of petitioner's constitutional rights, specifically, his right to equal protection of the laws?

(B) Considering the minute proportion of petitions for certiorari which are allowed in contrast with the number sought,* is it not unconscionable and a denial of access to the federal courts to limit attorneys to certiorari as the only possible means of federal review in such circumstances?

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* See footnote 4, p. 14, *infra.* In each of the past three terms, some 4% of all petitions for certiorari filed were allowed.

(C) Should not this Court take cognizance that certiorari is so rarely granted as to render the *Grossgold* limitation, as applied to the case at bar, an unconstitutional application of that decision when considered in the light of the usual futility in current practice of petitioning for certiorari?

2. With respect to the conspiracy count of the complaint, under 42 U.S.C. 1985:

(A) Is it necessary to allege a "class-based" discrimination in order to state a claim under 42 U.S.C. 1985, where it is alleged that respondents discriminated against petitioner as an individual?

(B) Was it not premature to dismiss this aspect of the complaint prior to discovery, where petitioner asserted that respondents' conspiratorial tactics prevented him from more fully alleging facts respecting the alleged conspiracy to deprive him of his constitutional rights and that he expected more fully to develop same via discovery with the aid of the court?

3. [Assuming *arguendo* that the complaint was properly dismissed:] Considering the legitimate questions respecting whether the *Grossgold* doctrine [set out above in Question 1] applies to petitioner's case, and, even if theoretically applicable, whether it may constitutionally be applied:

(A) Is not the District Court's order that petitioner pay certain attorneys fees to the respondent Woods' attorneys (of the Attorney General's staff) an unconstitutional punishment of petitioner for having attempted to pursue and vin-

dicate his constitutional rights pursuant to a good-faith interpretation of the Civil Rights Act even in the face of *Grossgold?*

(B) Does not such award impose a forbidden chilling effect upon the exercise of federally-guaranteed constitutional rights, especially those involving the right to judicial determination of one's rights?

Parties Involved

Petitioner, W. Jason Mitan, was the only appealing plaintiff. See footnote 5, page 15, *infra.* In addition to the Commission named in the caption, the other defendants-respondents were and are: Carl L. Rolewick, Administrator of the Commission; John Oswald, Investigator of the Commission; and Clell L. Woods, Clerk, Illinois Supreme Court.

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1. The Seventh Circuit's interpretation of the Civil Rights Act [42 U.S.C. 1983 et seq.]—barring attorneys from federal perusal of their claims of violation of due process in the procurement of a State disbarment order via the Act and limiting the possibility of federal review to the opportunity to petition for certiorari to the Supreme Court from the highest State court's order respecting the disbarment—denies equal protection of the laws to attorneys as opposed to members of other respected and regulated professions 8

A. The Seventh Circuit's application of *Grossgold* v. *Supreme Court of Illinois*, 557 F.2d 122 (7 Cir. 1977), to preclude Federal Civil Rights Act jurisdiction over petitioner's claim—although he alleged violations of his due process and other constitutional rights in the procurement of the State

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disbarment order [for alleged misstatements in his application for admission to the Bar, not for any supposed wrongdoing after his admission]—improperly limits the scope of the Civil Rights Act in a manner contrary to the obvious intent of the legislature and in violation of petitioner's constitutional rights, specifically, his right to equal protection of the laws 8

B. Considering the minute proportion of petitions for certiorari which are allowed in contrast with the number sought, it is unconscionable and a denial of access to the federal courts to limit attorneys to certiorari as the only possible means of federal review in such circumstances 8

C. This Court should take cognizance that certiorari is so rarely granted as to render the *Grossgold* limitation, as applied at bar, an unconstitutional application of that decision when considered in the light of the usual futility in current practice of petitioning for certiorari 9

2. With respect to the conspiracy count of the complaint (Count 5), under 42 U.S.C. 1985:

A. Where it is alleged that respondents discriminated against petitioner as an individual, it is not necessary to allege a "class-based" discrimination in order to state a claim under 42 U.S.C. 1985.

B. It was premature to dismiss this aspect of the complaint prior to discovery, where petitioner asserted that respondents' conspiratorial tactics prevented him from more fully alleging facts respecting the alleged conspiracy to deprive him of his constitutional rights, and that he expected more fully to develop same via discovery with the aid of the court 17

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3. Even if the (amended) complaint was properly dismissed, the District Court's order that plaintiff Mitan pay certain attorneys fees to defendant Woods' attorneys (of the Attorney General's staff) is an unconstitutional punishment of Mitan for having attempted to pursue and vindicate his constitutional rights pursuant to a good-faith interpretation of the Civil Rights Act even in the face of *Grossgold;* and such award imposes a forbidden chilling effect upon the exercise of federally-guaranteed constitutional rights, especially those involving the right to judicial determination of one's rights 20

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, W. Jason Mitan, respectfully prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit, to review its decision affirming the judgment of the District Court for the Northern District of Illinois, Eastern Division, dismissing petitioner's Complaint pursuant to the Civil Rights Act, 42 U.S.C. secs. 1983 et seq., with costs.

Judgment and Order Below

The Order of the Seventh Circuit affirming, with costs, the District Court's judgment dismissing the complaint and awarding certain attorneys' fees, entered January 16, 1981, is unpublished per Seventh Circuit Rule 35. The Seventh Circuit's judgment of the same date, entered upon completion of oral argument, is attached here as Appendix A. The court's unpublished Order (No. 80-2037) is attached as App. B.

Jurisdictional Statement

On January 16, 1981, the Court of Appeals for the Seventh Circuit entered its judgment affirming the District Court's judgment dismissing petitioner's (amended) Civil Rights Act complaint. (Apps. A & B) No petition for rehearing was filed. This petition is filed within 90 days of said date. Jurisdiction is invoked under 28 U.S.C. 1254(1), 28 U.S.C. 2101(c), and Rule 20.2 of the Rules of this Court.

Constitutional Provisions and Statutes Involved

The First Amendment to the United States Constitution provides, in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, . . ."

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person shall . . . be compelled . . . to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; . . ."

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the wtinesses against him; to have compulsory process for obtain-

ing Witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "Section 1. . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 42, United States Code, Sec. 1983, provides:

"§ 1983. Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Title 42, United States Code, Sec. 1985, provides in part:

"§ 1985. Conspiracy to interfere with civil rights—Preventing officer from performing duties

(1) * * *

Obstructing justice; intimidating party, witness, or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or prop-

erty on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

STATEMENT OF THE CASE

Basis for Federal Jurisdiction

Petitioner filed his Civil Rights Act Complaint (with amendments) in the United States District Court for the Northern District of Illinois, Eastern Division, which court of first instance is vested with jurisdiction pursuant to 28 U.S.C. 1331 & 1343.

Nature of the Case

Based entirely on his allegedly false statements in his application for admission to the Bar, and not due to any alleged misconduct or neglect as an attorney, petitioner W. Jason Mitan was ordered disbarred by the Illinois Supreme Court, following recommendations by the defendant-Commission's Hearing and Review Boards, No. 50594, entered January 12, 1979. (The Illinois Supreme Court's opinion, reproduced as App. A to the Complaint herein, R. 1, following p. 20 of the said Complaint, is reported at 75 Ill. 2d 118, 387 N.E.2d 278, 25 Ill.Dec. 622.) He and several civil and criminal clients filed the instant Civil Rights Act suit seeking to prevent Mitan's disbarment. (R. 1)*

Prior to the filing of the instant Complaint (as amended) in 1980, petitioner had filed in 1977 a similar complaint in the District Court, No. 77 C 240, alleging similar Civil Rights Act violations in contravention of his federal constitutional rights; the same defendants below then took the position that the complaint was premature, as no action had yet been ordered against Mitan. (A copy of the Com-

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* "R." refers to the Record on Appeal in the Seventh Circuit, No. 80-2037.

plaint in 77 C 240 is attached to the Complaint in issue as App. C.) (Pars. 1 through 12 of that prior Complaint were realleged as part of the instant Complaint.) (R. 1)

The precise allegations of the Complaint now at issue will not be restated here to avoid unnecessary duplication, as they are set forth during the course of the Argument which follows where necessary and appropriate.

The District Court's refusal to allow petitioner's motion for a temporary restraining order, (R. 11), as well as its dismissal of the Complaint shortly thereafter, (R. 23), were based upon its belief that the matter is controlled by *Grossgold* v. *Supreme Court of Illinois,* 557 F.2d 122 (7 Cir. 1977). The Court adhered to the position that petitioner's remedies were exhausted—and no Civil Rights Act action existed—where he had appealed the Disciplinary Commission recommendation to the Illinois Supreme Court and had unsuccessfully applied to the United States Supreme Court for certiorari (No. 79-276, cert. denied Oct. 15, 1979, attached as App. E to the complaint, R. 1), even after an amended complaint called to Judge McMillen's attention that federal disbarment proceedings were lately pending solely on the basis of the State disbarment order, thus removing Mitan's case from the authority of *Grossgold.* (R. 21)

Despite petitioner's reasonable arguments why *Grossgold* should not bar his complaint, the Court further ruled that the defendant Woods is entitled to attorneys' fees in the amount of $1,050.00, representing time spent by the Assistant Attorney General defending the action after the time *Grossgold* was formally called to petitioner's counsel's attention. (R. 29)

On appeal, the Seventh Circuit affirmed all aspects of the District Court's decision. (Apps. A & B)

Statement of Facts

The cause was considered and decided adversely to petitioner on the pleadings; no evidentiary hearings were held. (R. 23)

All facts necessary to an understanding and resolution of the issues raised herein are set forth in the verified (amended) Complaint (including Appendices thereto), R. 1, summarized in pertinent part within the Argument which follows.

REASONS FOR GRANTING THE WRIT

1.

The Seventh Circuit's interpretation of the Civil Rights Act [42 U.S.C. 1983 et seq.]—barring attorneys from federal perusal of their claims of violation of due process in the procurement of a State disbarment order via the Act and limiting the possibility of federal review to the opportunity to petition for certiorari to the Supreme Court from the highest State court's order respecting the disbarment—denies equal protection of the laws to attorneys as opposed to members of other respected and regulated professions.

A. The Seventh Circuit's application of Grossgold v. Supreme Court of Illinois, 557 F.2d 122 (7 Cir. 1977), to preclude Federal Civil Rights Act jurisdiction over petitioner's claim—although he alleged violations of his due process and other constitutional rights in the procurement of the State disbarment order [for alleged misstatements in his application for admission to the Bar, not for any supposed wrongdoing after his admission]—improperly limits the scope of the Civil Rights Act in a manner contrary to the obvious intent of the legislature and in violation of petitioner's constitutional rights, specifically, his right to equal protection of the laws.

B. Considering the minute proportion of petitions for certiorari which are allowed in contrast with the number sought, it is unconscionable and a denial of access to the federal courts to limit attorneys to certiorari as the only possible means of federal review in such circumstances.

C. This Court should take cognizance that certiorari is so rarely granted as to render the Grossgold limitation, as applied at bar, an unconstitutional application of that decision when considered in the light of the usual futility in current practice of petitioning for certiorari.

In 1977, when petitioner originally filed his prior civil action (App. C to the Complaint, R. 1), *before* any adverse orders had been entered in the State disciplinary proceedings, he was told his action was premature, because nothing had yet been done to him. But in 1980, *after* being disbarred, when petitioner seeks federal redress for constitutional violations in the procurement of the State order disbarring him from the practice of law, he is told he is irrevocably bound by the State Supreme Court's order implementing the defendant Commission's recommendation of disbarment.(!) (See pp. 4-5, *supra.*)

The reviewing court approves the District Court's order dismissing the complaint because:

> "A disbarment order of the highest court of a state may be reviewed federally only in the Supreme Court by petition for *certiorari* and not by suits in the district courts." (App. B, p. App. 4)

To support this, the Court relies on *Grossgold* v. *Supreme Court of Illinois,* 557 F.2d 122, 125 (7 Cir. 1977), as did the District Court and respondents below.

Indiscriminate, literal application of the *Grossgold* doctrine to all attorney discipline cases is constitutionally infirm for several reasons.

First, this results in a *denial of equal protection* of the laws (*i.e.,* the federal civil rights laws) as against attor-

neys when compared to other citizens generally. Strict adherence to the ostensible gloss of this doctrine precludes attorneys, as a class, from relying on the protections of the Constitution as enforced through Civil Rights Act complaints in the federal courts, while allowing such protection, not only to the public at large, but also to practitioners in other professions involving ethical dealings with the public. See, *e.g., Gibson* v. *Berryhill,* 411 U.S. 564 (1973) (optometrists).

Moreover, here, we attack the constitutionality of some of the Bar rules themselves, both facially and as applied.[1] Thus this case comes, not squarely within *Grossgold* v. *Supreme Court of Illinois,* 557 F.2d 122 (7 Cir. 1977), but rather, within the realm of *Ktsanes* v. *Underwood,* 552 F.2d 740, 743 (7 Cir. 1977), to the effect that the District Court *can* review the constitutionality of a State's Supreme Court Rules, as against constitutional challenge on Fourteenth Amendment grounds. See *Grossgold, supra,* at 125.

Finally, authorities underlying the *Grossgold* decision support our invocation of federal jurisdiction. In *MacKay* v. *Nesbitt,* 412 F.2d 846 (9 Cir. 1969), the reviewing court noted that a State Supreme Court's order disciplining a lawyer *can* be reviewed by a federal court if such order is urged as a ground for barring the lawyer from practice before the federal court. Although no such proceedings were pending against Mitan, we alleged the real possibility that they will be; indeed, in the additional prayer contained in the Amendment to the Complaint, petitioner seeks a declaratory judgment that the State's disciplinary order

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[1] Petitioner alleged, *inter alia,* violation of his Fifth Amendment privilege against self-incrimination, as to use against him, in the procurement of his disbarment, of a presumption arising from his failure satisfactorily to answer the Commission's formal "Request for Admission" pursuant to certain civil discovery rules adopted by the Commission; this unconstitutional presumption, violative of due process, was a basis for finding petitioner had made false statements on his application for admission to the Bar.

not be utilized in any such proceeding. (R. 3). Declaratory judgment practice does not require that such proceeding actually be pending; the reality of the probability is sufficient.[2] Hence, the federal court may properly examine the State court's order.

In *Clark* v. *State of Washington,* 366 F.2d 678 (9 Cir. 1966), the reviewing court noted that if plaintiff were threatened with suspension from federal law practice on the basis of the State court action complained of, the federal court *can* look into the merits of the State disciplinary order. *Id.* at 680. Here, petitioner's amended complaint (R. 21) asserted the pendency of such proceedings, which the District Court apparently ignored. (R. 23; See R. 22.)

Jones v. *Hulse,* 391 F.2d 198, 201 (8 Cir. 1968), similarly holds a federal court *can* inquire into the propriety of a State disbarment order, where practice before the federal court is concerned. It is in issue here.[3] (R. 21)

In addition to the legal and logical reasons just stated, *Grossgold* ought not govern here for its facts are inapposite. In *Grossgold,* the attorney did not, as Mitan does here, challenge the *underlying basis of the disciplinary order.* Grossgold had received a presidential pardon upon

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[2] Indeed, before the order of dismissal was entered, petitioner filed an amendment alleging that such proceedings in fact were instituted. (R. 21, setting forth disciplinary proceedings No. 80 D 5, then still pending.) The lower court ruled (R. 23) against petitioner *before* the time within which defendants were to respond. (R. 22)

In fact, petitioner was disbarred by action of the District Court's Executive Committee, No. 80 D 5, by order entered December 29, 1980, *nunc pro tunc* January 16, 1980. The federal disbarment was based *solely* on the State disbarment.

[3] See also *In re Noell,* 93 F.2d 5 (8 Cir. 1937), where the Court refused to recognize as valid an order of suspension by a State Court against an attorney, based on procedures lacking in due process.

his mail fraud conviction, the basis of the disciplinary order. The only constitutional violation he claimed was that in disregarding the pardon, the Illinois court unconstitutionally interfered with the effect of the pardon. 557 F.2d at 124. There was no claim, as here, attacking the very basis for the disciplinary order. Had Grossgold attacked the underlying conviction, asserting that it was obtained through unconstitutional conduct actionable under the Civil Rights Act, the case would be roughly comparable to ours. But he did not. All Grossgold asserted was the pardon, though the underlying conduct—not attacked—clearly involved moral turpitude (mail fraud).

* * *

The Complaint States a Valid Claim:

There is a recognized federally protected right to practice law, which right cannot be interfered with in absence of the full panoply of due process procedural and substantive protections. For example, it is clear that the federal courts will not hesitate to review the constitutionality of Bar attorney-disciplinary proceedings attacked in a properly framed civil rights complaint. In *Taylor* v. *Kentucky State Bar Ass'n,* 424 F.2d 478 (6 Cir. 1970), an attorney against whom disciplinary proceedings were then pending, together with four of his clients, brought action against the Bar Association under 42 U.S.C. 1983 and 28 U.S.C. 1343, alleging various due process and freedom of expression violations in connection with the pending disbarment proceedings. The District Court dismissed the complaint, and the Court of Appeals reversed. Although the reviewing court agreed that the facial challenge to the State statutes and rules was insufficient to require the convening of a three-judge court, plaintiffs' claim as to unconstitutional enforcement of said statutes and rules stated a valid Civil Rights Act complaint. In reversing the lower court's dismissal of the complaint, the Court of Appeals held:

> "It is not necessary that the state statute under which the [attorney disciplinary] proceedings were . . . instituted be unconstitutional on its face. The Supreme Court has recently stated:
>
> > 'we have not hesitated on direct review to strike down applications of constitutional statutes which we have found to be unconstitutionally applied to suppress protected freedoms.' *Cameron* v. *Johnson*, . . . [390 U.S. 611, 620 (1968).]
>
> Nor is it technically necessary that the vehicle [under attack] be a criminal prosecution by the state—disbarment proceedings having been described as 'proceedings of a quasi-criminal nature, *In re Ruffalo*, 390 U.S. 544, 551 . . . (1968)—where, under color of state law or court rule, the effect is to chill the exercise of First Amendment freedoms." 424 F.2d at 481.

The Court further noted that the federal anti-injunction statute, 28 U.S.C. 2283, did not apply, because the complaint was filed prior to State court adjudication of the disciplinary proceedings, thus implying that in such a case as the instant complaint, where the State court has proceeded to order plaintiff Mitan disbarred, the anti-injunction statute *would* bar federal intervention. However, the specter of this implication has been laid to rest in a subsequent Supreme Court decision, *Mitchum* v. *Foster*, 407 U.S. 225 (1972), holding that 42 U.S.C. 1983 creates an express exception to the anti-injunction statute. Moreover, in *Gibson* v. *Berryhill, supra*, (optometrists' case), this Court reiterated that *Mitchum* v. *Foster* "determined that actions brought under the Civil Rights Act, 42 U.S.C. Sec. 1983, were within the 'expressly authorized' exception to the ban on federal injunctions." 411 U.S. at 573.

Other cases specifically recognizing a right to practice law, entitled to federal protection, include: *Keker* v. *Pro-*

cunier, 398 F.Supp. 756 (D. Cal. 1975); *Eisenberg* v. *Boardman,* 302 F.Supp. 1360 (W.D. Wis. 1969).

Recognizing a concomitant right to act as a paralegal, and, inferentially, recognizing a right to practice law, as protected by the Constitution and enforceable through the Civil Rights Act, is *Phillips* v. *Board of Prisons,* 591 F.2d 966 at 970 (D.C. Cir. 1979).

* * *

As *Grossgold* is applied herein, a lawyer is effectively precluded from any meaningful federal review of his claims of constitutional deprivation in the State proceedings; and where, as here, his claims of deprivation involve allegations against the administrative personnel designated by the Supreme Court to act on the Attorney Registration and Disciplinary Commission, it becomes increasingly difficult to see how the State Court can objectively and properly determine the merits of his constitutional claims.

And in reality, when one considers the miniscule proportions of certiorari petitions which are granted by the Supreme Court,[4] this means that a rarely granted form of discretionary review in the highest federal court is the *only* thing standing between a Sec. 1983 plaintiff who happens to be a disciplined or about-to-be-disciplined attorney and the very State agency whose powers the plaintiff claims have been abused in violation of his constitutional rights. [We referred to this phenomenon below as "leaving the fox to guard the chicken-coop."]

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[4] The following figures were recently obtained by telephone from Asst. Supreme Court Clerk Schade:

In the October, 1977 term (ending July 30, 1978), 3,550 petitions for certiorari were denied and 159 granted; in the October, 1978 term, 3,660 petitions denied, 163 granted; in the October, 1979 term, 3,563 denied, 154 granted.

Such judicial interpretation of the statute has all but emasculated it, where attorneys' rights are concerned.[5]

The reviewing court's failure to respond to our "Catch 22" argument—that is, that before the State actually disbarred him, his federal action was premature, and there-

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[5] The allegations of the verified Amended Complaint stood undenied; dismissal was on the pleadings.

Although the client-plaintiffs are not co-appellants herein, still this Court should consider the complaint as a whole, including their allegations, (Counts 2 through 4), in determining whether the District Court was correct to dismiss the complaint. The *Grossgold* doctrine has never been and should not be applied so as to defeat the claim of a *non*-attorney asserting damage due to the attorney's imment disbarment. *Cf. Kissell* v. *Breskow*, 579 F.2d 425 (7 Cir. 1978). What the Seventh Circuit fails to perceive, in referring to the non-appealing client-plaintiffs, is that in reviewing an order dismissing a cause on the pleadings, the material facts therein alleged must be taken as true. *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738 (1976). In other words, although those client-plaintiffs were not before the Seventh Circuit as appellants, still, in assessing the propriety of the order dismissing the complaint, the District Court and the Seventh Circuit should have, and this Court must, consider *all* the facts alleged as true, and this applies equally to the allegations of the client-plaintiffs, insofar as Mitan's claim in the District Court is buttressed by the allegations of those plaintiffs. The merits of the dismissed complaint must, we submit, be judged by viewing the complaint as a whole, including the plaintiff-clients' allegations. See *Taylor* v. *Kentucky State Bar Ass'n, supra; Phillips* v. *Board of Prisons, supra.*

While this class of plaintiffs may not abrogate the State Supreme Court's function in disciplining attorneys, still the complaint which included their individual allegations concerning their desire to retain Mitan as their attorney, and asserting that disbarring Mitan in effect would deprive them of counsel of their choice, is quite different from the complaint in which the sole complainant is the attorney.

after, his federal action was barred by *res judicata*[6]—an unconscionable situation leaving one without a remedy at all—adds fuel to the argument.

In *Gibson* v. *Berryhill, supra,* a situation involving license revocation against licensed optometrists for unauthorized practice (by accepting corporate employment in violation of certain ethics rules), the Supreme Court held that the District Court had properly enjoined such proceedings in accordance with the prayer of plaintiffs' complaint under 42 U.S.C. 1983, and that the determinations of State administrative proceedings were *not* binding on the District Court where—as in the case at bar—the complaint alleged due process violations at the State administrative level.

Indeed, any holding based upon *res judicata* in the face of the Count 1 allegations without further inquiry—as here—has, in effect, emasculated the Civil Rights Act, for it has allowed the very persons charged with violating

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[6] All defendants below relied on *res judicata* in support of their conclusion that no claim has been stated on which relief can be granted, and the District Court agreed. (R. 11; R. 23) Defendants asserted that the matter had been fully adjudicated, and the sanction of disbarment had been "approved" by both the Supreme Court of Illinois and the United States Supreme Court.

The denial of certiorari by the Court has no bearing on the merits, nor is said denial to be taken as an "approval" of the proceedings below. In this Court's own words:

> "[A] denial of certiorari normally carries no implication or inference, *Chessman* v. *Teets,* 354 U.S. 156, 164 . . . n. 13 (1957); *Brown* v. *Allen,* 344 U.S. 443 (1953). . . ." *United States* v. *Kras,* 409 U.S. 434, 443 (1973).
>
> "For the well-settled view that denial of certiorari imparts no implication or inference concerning the Court's view of the merits, see *Maryland* v. *Baltimore Radio Show,* 338 U.S. 912, 919 . . . (Frankfurter, J.)." *Hughes Tool Co.* v. *Trans World Airlines,* 409 U.S. 363, 365 n.1 (1973).

plaintiffs' civil rights effectively to prevent a federal court from considering whether such violation had occurred. While the Illinois Supreme Court adopted and approved the Commission's disbarment recommendation, such action was predicated upon what petitioner Mitan asserts involved numerous procedural and substantive violations of various of his constitutional rights, including an unconstitutional use of civil discovery rules to establish his alleged falsehoods in his application for admission to the Bar. The substantial allegations—verified and undenied—that the State proceedings deprived petitioner Mitan of various federally guaranteed civil rights, must be within the cognizance of the District Court.

• • •

Considering the rare instances, proportionately speaking, in which certiorari is granted, to deem it the *sole* possible way to have a federal court consider the constitutional validity of a State disbarment order is to effectively deny federal review. Certiorari should therefore be allowed.

2.

With respect to the conspiracy count of the complaint (Count 5), under 42 U.S.C. 1985:

A. Where it is alleged that respondents discriminated against petitioner as an individual, it is not necessary to allege a "class-based" discrimination in order to state a claim under 42 U.S.C. 1985.

B. It was premature to dismiss this aspect of the complaint prior to discovery, where petitioner asserted that respondents' conspiratorial tactics prevented him from more fully alleging facts respecting the alleged conspiracy to deprive him of his constitutional rights, and that he expected more fully to develop same via discovery with the aid of the court.

Whether or not the allegations of Count 5, alleging a conspiracy in violation of 42 U.S.C. 1985, can be substan-

tiated during the course of discovery and trial, is not the issue at this point in time.

The conspiracy allegations are not merely conclusory, for specific acts are alleged upon information and belief, to wit, that defendants Administrator and Investigator (Rolewick and Oswald) conducted their investigation in such a manner as to contact past and present clients of plaintiff Mitan in an unsuccessful effort to obtain grounds to proceed against him in disciplinary proceedings, seeking a factual basis for asserting misconduct in the practice of law, which was not in fact alleged in the charges brought against him.

We have further asserted that, given the opportunity pursuant to the civil discovery tools available to plaintiffs, they expect and anticipate being able to furnish more specific particulars and proof as to this Count.

• • •

A. The Seventh Circuit held that the conspiracy count must fail because no recognized "class-based" discrimination was alleged. (App. B, p. App. 4) In *Wakat* v. *Harlib*, 253 F.2d 59 (7 Cir. 1958), the court found an allegation of discrimination, essential to a Sec. 1985 violation, in a discrimination against plaintiff based on his past criminal record; but more than that, the court stated that *even discrimination against him as an individual would suffice to properly allege a claim under the conspiracy portion of the Civil Rights Act.* This earlier Seventh Circuit decision, stating the view we urge this Court to adopt, conflicts with the Seventh Circuit's present view of Sec. 1985 *vis a vis* the requirement of a "class-based" discrimination. (See R. 21A, Tr. of Jan. 7, 1980, p. 5; R. 23, p. 5.)

The Seventh Circuit in *Wakat* v. *Harlib, supra,* affirming judgment for the plaintiff on his civil rights complaint under the conspiracy section, 42 U.S.C. 1985, held that

even if Sec. 1985 requires a showing that plaintiff was discriminated against as a member of a class, discrimination on the basis of a person's past criminal record, no less than race-creed-color discrimination, constitutes invidious discrimination actionable under Sec. 1985. But the Court did *not* find that discrimination-by-class was requisite to such an action; it was sufficient that plaintiff alleged discrimination against him as an individual:

> "[T]he record reveals discrimination against plaintiff as an individual . . . such discrimination is a violation of his federal civil rights under Sec. 1985." *Id.* at 64.

B. Petitioner asserted that, given the opportunity to pursue available civil discovery tools,[7] he expects to be able to furnish more specific particulars and proof. (Pl. Br. p. 23)

In the face of such assertion, and considering the judicial philosophy expressed in the accompanying footnote, it was wrong for the lower court to dismiss Count 5.

* * *

Certiorari should be allowed so this Court may answer the important questions posited in this portion of the Petition, both to insure uniform application of the Civil Rights Act and to maximize fruitful use of civil discovery.

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[7] Per a unanimous Court:

> "[W]here 'the proof is largely in the hands of the alleged conspirators,' . . . [citation omitted], dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Hospital Building Co.* v. *Trustees of Rex Hospital,* 425 U.S. 738, 746 (1976) (reversing dismissal of antitrust complaint).

3.

Even if the (amended) complaint was properly dismissed, the District Court's order that plaintiff Mitan pay certain attorneys fees to defendant Woods' attorneys (of the Attorney General's staff) is an unconstitutional punishment of Mitan for having attempted to pursue and vindicate his constitutional rights pursuant to a good-faith interpretation of the Civil Rights Act even in the face of Grossgold; and such award imposes a forbidden chilling effect upon the exercise of federally-guaranteed constitutional rights, especially those involving the right to judicial determination of one's rights.

The lower court ordered Mitan to pay defendant Woods'[8] attorneys' fees, assessed after his counsel was advised of *Grossgold, supra.* (R. 29)

In view of the legitimate, reasonable arguments why *Grossgold* should not apply (see pp. 8-12, *supra,* also called to the District Court's attention, see R. 18), such award constitutes an impermissible impediment to the right of access to the federal courts, and exerts a forbidden chilling effect upon the exercise of federally-guaranteed constitutional rights. While "bad faith" on petitioner's part in pursuing his action after *Grossgold's* existence was brought to his counsel's attention was superficially alleged (R. 27, p. 2), it was not proven, and the reasonable arguments pointed out above negate any such bad faith.[9]

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[8] Clell L. Wood is Clerk of the Illinois Supreme Court.

[9] Petitioner reasonably believed that Woods, as Clerk of the Illinois Supreme Court, was a necessary party defendant so that, should plaintiff prevail, the District Court would have the power to enforce its judgment through enjoining Woods. The fact that petitioner alleged no wrongdoing against him personally must not, therefore, be dispositive.

Allowing the award of attorneys' fees against petitioner to stand here does violence to the principles underlying the very existence of the Civil Rights Act, and should not be countenanced by this Court.

> "The right of access to the courts is protected by both the Fifth and Fourteenth Amendment due process clauses . . ." 1 ANTIEAU, FEDERAL CIVIL RIGHTS ACTS §134, at 241 (2d Ed. 1980).

See, *e.g., Cruz* v. *Beto,* 405 U.S. 319 (1972); *Boddie* v. *Connecticut,* 401 U.S. 371 (1972); *Stiltner* v. *Rhay,* 322 F.2d 314 (9 Cir. 1963).

In *Christianburg Garment Co.* v. *EEOC,* 434 U.S. 412 (1978), relied on by the Seventh Circuit (App. B, p. App. 4), this Court, in approving the denial of attorneys' fees to a successful defendant, said:

> "[I]t is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation . . . [T]he course of litigation is rarely predictable . . . The law may change or clarify in the midst of litigation. . . ." *Id.* at 421-22.

The reviewing court has not even attempted to respond to petitioner's argument that the assessment of attorneys' fees in such a situation amounts to the imposition of a chilling effect upon the exercise of constitutional rights—a most significant omission.

CONCLUSION

Petitioner was dismissed out of the District Court in 1977 as "premature" while administrative proceedings were yet pending; and now that he has been disbarred, his claim has become so "overripe" that in 1980 the District Court deemed itself precluded from entertaining the complaint at all. This is not fair.

Nor is it fair to bar lawyers, but not members of other professions, from Civil Rights Act relief, based on an exception judicially carved out of the statutes by the *Grossgold* decision, *supra,* and its ilk.

The verified allegations have not been denied, and the District Court should have denied the motions to dismiss, requiring the defendants to answer the merits of the complaint.

* * *

For any or all of the foregoing reasons, Certiorari should be allowed; and, on consideration of the merits, the order dismissing the Complaint as amended and awarding certain attorneys' fees should be reversed, with appropriate directions.

Respectfully submitted,

JULIUS LUCIUS ECHELES
CAROLINE JAFFE
Attorneys for Petitioner

APPENDIX

APPENDIX A

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

January 16, 1981.

Before

Hon. Thomas E. Fairchild, Chief Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Adrian A. Spears, Senior District Judge*

W. JASON MITAN,

Plaintiff-Appellant,

No. 80-2037 vs.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 79-C-5282

Thomas R. McMillen, *Judge*.

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* Senior District Judge Adrian A. Spears of the Western District of Texas is sitting by designation.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with costs, in accordance with the order of this court entered this date.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Unpublished Order
not to be cited
per Circuit Rule 35

(Argued January 16, 1981)

January 16, 1981.

Before

Hon. Thomas E. Fairchild, Chief Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Adrian A. Spears, Senior District Judge*

W. JASON MITAN,

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ORDER

The Court, having read the briefs, addressed itself to the record, heard oral argument on behalf of the appellant, and conferred at the bench, announced in open court that the judgment appealed from is AFFIRMED.

A disbarment order of the highest court of a state may be reviewed federally only in the Supreme Court by petition for *certiorari* and not by suits in the district courts. *See Grossgold* v. *Supreme Court of Illinois,* 557 F.2d 122, 125 (7th Cir. 1977). The force of this rule may not be avoided by bringing an action under the Civil Rights laws to vindicate constitutional claims. *See Kissell* v. *Breskow,* 579 F.2d 425 (7th Cir. 1978).

The conspiracy count under 42 U.S.C. § 1985 failed to allege any form of class-based animus. *See Lessman* v. *McCormick,* 591 F.2d 605, 608 (10th Cir. 1979); *Lesser* v. *Braniff Airways, Inc.,* 518 F.2d 538, 543 (7th Cir. 1975).

The question of whether the constitutional rights of plaintiff's clients were violated by his disbarment is of doubtful merit in light of our *Kissell* decision, *supra,* and in any event is not before us since those parties have not appealed. The district court did not err in ordering plaintiff to pay part of defendant Woods' attorneys' fees. *See Christiansburg Garment Co.* v. *EEOC,* 434 U.S. 412, 422 (1978).

Accordingly, the Clerk of this Court is directed to enter judgment AFFIRMING the judgment appealed from.